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In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS J. GILLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 599 F. 2d 541. The opinion of the district court (Pet. App. 1b-16b) is reported at 458 F. Supp. 887.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1979. A timely petition for rehearing was denied on June 12, 1979 (Pet. App. 1c). The petition for a writ of certiorari was filed on July 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the intent requirement in a criminal prosecution under Section 1 of the Sherman Act is satisfied by proof that petitioner knowingly authorized his company's participation in a conspiracy to fix prices.

2. Whether the evidence is sufficient to show that petitioner participated in the price-fixing conspiracy.

STATEMENT

1. Following a trial to the court in the United States District Court for the Middle District of Pennsylvania, petitioner, president and part owner of Blue Coal Corporation, was convicted of violating Section 1 of the Sherman Act, 15 U.S.C. 1, by conspiring to fix the price of anthracite coal sold to line-dealers.[1] Upon petitioner's conviction, the court imposed a six-month suspended sentence, a two-year term of probation with a special condition of community service, and a $35,000 fine (Pet. 4; Pet. App. 4a).[2]

The conspiracy began as early as 1961 and continued until the end of 1973 (Pet. App. 15b). It was conducted in part through representatives of the coal companies who met periodically to discuss and fix the line-dealer prices (*id.* at 2b-3b). At these meetings, the representatives would reach a tentative agreement on the prices to be charged, the effective date for price changes, the date on which the new prices would be announced, and the company that would take the lead in making the new prices public (*ibid.*). Petitioner's company was represented at the meetings by Carl Tomaine, its Vice President in charge of domestic and retail sales (*id.* at 2b-3b, 9b).

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[1]Blue Coal Corporation was engaged in the business of mining, processing and selling anthracite coal. The coal was sold in separately priced sizes to various kinds of dealers. Line-dealers are those who are not based in the vicinity of the coal production facilities and thus transport the purchased coal by truck or rail to their own storage facilities (Pet. App. 2b). The prices charged to line-dealers were contained in price "circulars" issued by sellers three to four times per year (*ibid.*).

[2]The Sherman Act was amended in 1974 to make violations of Section 1 a felony. Petitioner was indicted for a violation occuring prior to the 1974 amendments and therefore was charged with a misdemeanor.

After reaching a tentative agreement, the representatives reported to their superiors for final approval (Pet. App. 2b-3b). As its president, petitioner had final authority to determine the prices charged by Blue Coal (*id.* at 4b). Accordingly, Tomaine conferred with petitioner concerning circular price changes, and he informed petitioner of what had been discussed at the meetings and the prices that had been agreed upon (*id.* at 10a-11a, 3b, 13b-15b). Petitioner knew and approved of the actions of Tomaine in the agreements reached at the meetings (*id.* at 3b).

On receiving clearance from their superiors, the representatives, including Tomaine, would confirm the original agreement by telephone (Pet. App. 3b). After confirmation, the companies would issue their line-dealer circulars in conformity with the agreement (*ibid.*).[3] Generally, the companies adhered to the agreed-on prices (*id.* at 4b, 9b).[4]

2. The district court, sitting as the trier of fact, found that petitioner knew of the conspiracy, expressed his approval of it at meetings with other producers, and agreed to adhere to it (Pet. App. 3b-5b, 13b-14b). It further found that petitioner authorized Tomaine to commit Blue Coal to the pricing agreements (*id.* at 14b-

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[3]Occasionally, the circulars contained minor variations when necessary to compensate for peculiar market or inventory situations (Pet. App. 8b).

[4]Sometimes the companies deviated from the agreed-on prices (Pet. App. 9b). At one point during the conspiracy, price discounting became particularly heavy and necessitated a special meeting of the companies (*id.* at 9b-10b). At this so-called Brutico's meeting—named after the restaurant in which it was held—all those attending, including petitioner, committed themselves to raising the price (*id.* at 4b, 9b-10b). The meeting was successful and prices were increased to be more in line with the agreed-upon circular prices (*id.* at 10b).

15b). The court thus concluded that petitioner was a knowing participant in the conspiracy (*id.* at 13b, 16b). The court rejected petitioner's contention that the government was required to prove a specific intent to restrain trade, holding that petitioner's knowing participation in a conspiracy to fix prices was sufficient to establish the intent element of the Sherman Act (*id.* at 11b-12b).

3. The court of appeals affirmed. It determined that there was sufficient evidence to support the district court's finding that petitioner knowingly participated in the conspiracy (Pet. App. 10a-12a). Moreover, analyzing this Court's recent decision in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), the court of appeals held that in a criminal prosecution for the *per se* offense of price fixing under Section 1 of the Sherman Act, the *Gypsum* intent requirement is necessarily satisfied by the government's proof of the defendant's knowing participation in a conspiracy to fix prices (*id.* at 4a-10a).

ARGUMENT

The finding of the courts below that petitioner knowingly participated in a conspiracy to fix prices is sufficient to meet the intent requirement expressed in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978). The decision of the court of appeals is therefore correct, and it is consistent with the decisions of the other courts of appeals that have interpreted *Gypsum*. Accordingly, review by this Court is unwarranted.

1. Petitioner contends (Pet. 9-12) that the court of appeals ignored this Court's holding in *Gypsum* that intent is an element of the offense in criminal prosecutions under the Sherman Act.

In *Gypsum*, this Court held that in a criminal prosecution for violation of Section 1 of the Sherman

Act, the government must prove (1) that the defendant acted with the purpose of producing an anticompetitive effect, or (2) that, in cases in which an anticompetitive effect resulted from the defendant's conduct, the defendant acted with the knowledge that such an effect probably would occur (438 U.S. at 444-445 & n.21, 446). Rather than ignoring this holding, the court of appeals recognized that in criminal cases involving a *per se* violation of Section 1 of the Sherman Act, this intent element is established by evidence that a defendant knowingly participated in a conspiracy to commit the *per se* offense (Pet. App. 4a-10a).

This holding is completely consistent with *Gypsum*. *Gypsum* involved price verification, a business practice that, unlike the price fixing charged in the present case, does not constitute a *per se* violation of the Sherman Act. In *Gypsum*, the intent requirement served to prevent the Sherman Act from establishing criminal liability for equivocal business activity that is in "the gray zone of socially acceptable and economically justifiable business conduct" and that only "after the fact is determined to violate the statute * * *" (438 U.S. at 441).

The Court's concern in *Gypsum* regarding "overdeterrence [of] salutary and procompetitive conduct lying close to the borderline of impermissible conduct" (438 U.S. at 441) has no bearing here, for this case does not involve equivocal or potentially procompetitive business conduct. Rather, petitioner was convicted of price fixing, a *per se* violation of the Sherman Act. Such offenses are so inherently anticompetitive that no inquiry need be made into the actual effects of the conspiracy or the possible beneficial motives of the defendant.[5]

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[5]See, *e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927); *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211 (1899).

In holding that intent is an element of a Sherman Act criminal prosecution, the Court in *Gypsum* expressly noted the *per se* illegality of certain conduct with unquestionably anticompetitive effects (438 U.S. at 440-441), and nothing in the opinion suggests that the Court intended to abandon the *per se* rule in criminal cases. Under the *per se* rule, proof that a defendant intended to engage in price fixing is tantamount to proving not only that he knew that his conduct was anticompetitive, but also that he had the purpose of imposing its anticompetitive effects on the marketplace.[6] Thus, as the court of appeals in this case recognized, the purpose to produce anticompetitive effects is established by evidence of a defendant's knowing participation in a conspiracy to commit a *per se* violation of the Sherman Act. "[T]he conscious object of every price-fixing conspiracy is an illegal act. * * * [W]here, as here, individuals have fixed prices in a most unequivocal and flagrant manner, questions of knowledge of probable consequences and indeed of 'conscious object' appear clearly answered" (Pet. App. 9a-10a). The reason for the *per se* rule is in part to avoid any necessity to inquire behind the fact of the agreement to do something deemed overwhelmingly likely to be harmful to competition.[7] Therefore, the court of appeals correctly held that the evidence of petitioner's

[6]As one commentor has noted, "it is inconceivable that those who engage in conduct so pernicious that it is 'conclusively presumed to be unreasonable' would not know the probable effects of their actions." Handler, *Antitrust—1978*, 78 Colum. L. Rev. 1363, 1399-1400 (1978) (footnotes omitted).

[7]In other words, to argue that *Gypsum* requires proof beyond the intent knowingly to participate in the price-fixing conspiracy is to argue that *Gypsum* abandoned the *per se* rule in criminal cases. But, as discussed above, *Gypsum* evinces the Court's continued adherence to, rather than its disavowal of, the *per se* rule.

knowing participation in a price-fixing consipracy sufficed to establish the intent element of the offense.[8]

2. Petitioner's contention that a conclusive presumption of intent in criminal price-fixing cases is unconstitutional (Pet. 13-14) is beside the mark. The court of appeals did not establish a conclusive presumption of intent in *per se* cases. Rather, it merely applied the *per se* rule to the facts of this case to conclude that the government had proven every essential element of the offense beyond a reasonable doubt.

Unlike the situations before this Court in *Gypsum* and in *Sandstrom* v. *Montana*, No. 78-5384 (June 18, 1979), the government was not relieved of its burden of proving the intent element of the offense beyond a reasonable doubt. The *per se* rule is a substantive principle of law that defines the elements of the offense, not an evidentiary presumption that requires the jury to make prescribed inferences relating the facts adduced at trial to the elements of the offense. The *per se* rule does not make the defendant's purpose irrelevant. Rather, it applies only if the trier of fact first finds that a defendant has knowingly conspired to engage in conduct constituting a *per se*

[8]Contrary to pettitioner's contention (Pet. 14), there is no conflict in the circuits on the application of *Gypsum* to cases involving *per se* violations of the Sherman Act. See *United States* v. *Continental Group, Inc.*, No. 78-2328, 3d Cir. Jul. 20, 1979); *United States* v. *Foley*, 598 F. 2d 1323 (4th Cir. 1979), pets. for cert. pending, Nos. 78-1737, 78-1838, 79-93; *United States* v. *Brighton Building & Maintenance Co.*, 598 F. 2d 1101 (7th Cir. 1979), pets. for cert. pending, Nos. 78-1872, 79-111. The Fourth Circuit's statement in *Foley* that intent is an element in all Section 1 criminal prosecutions (598 F. 2d at 1335 n.13) is not inconsistent with the decision in this case, for the court below held that the requisite intent under *Gypsum* is established by proof of the defendant's knowing participation in a price-fixing conspiracy (Pet. App. 8a, 9a).

violation of the Sherman Act.[9] Under these circumstances, the *per se* rule holds that no further inquiry need be made. "It is as if the Sherman Act read: 'An agreement among competitors to [fix prices] is illegal.' " *United States* v. *Brighton Building & Maintenance Co.*, *supra*, 598 F. 2d at 1106. The *per se* rule thus does not establish an unconstitutional presumption regarding intent; instead, it serves to render unnecessary any further inquiry, once the government has proven beyond a reasonable doubt that the defendant intended to engage in conduct deemed illegal.

3. Petitioner's final contention is that there was no evidence of his participation in the conspiracy and that he was found guilty merely because of his position with Blue Coal (Pet. 17-19). This is a routine assertion of factual error, and "review would be of no importance save to the litigants themselves." *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962).

In any event, petitioner's contention ignores the evidence in the record relied on by the courts below. For example, petitioner at times suggested that the conspirators begin working on the price lists (Pet. App. 11a, 5b). In addition, at the Brutico's meeting, petitioner committed his company to stricter adherence to the circular prices (see note 4, *supra*; Pet. App. 12a, 4b). Moreover, petitioner was continually informed of the price agreements and approved them (*id.* at 12a-13a, 3b).

[9]The instruction at issue in *Gypsum* directed the jury to presume that the defendants had an unlawful intent if it found that their conduct produced anticompetitive effects. This " 'effects alone' test" made defendants' purpose irrelevant, thus converting the criminal provisions of the Sherman Act into "strict-liability" offenses (438 U.S. at 435-436).

This evidence is more than sufficient to establish petitioner's knowing participation in the conspiracy.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10]The court of appeals also observed that a company president who knows that his company is engaged in price fixing but fails to stop it "may not insulate himself from liability by leaving the actual execution of the scheme to his subordinates" (Pet. App. 12a). In this case, petitioner's involvement in the conspiracy went beyond his knowledge of it and his failure to stop it. Rather, as noted above, he directly participated.

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